

Comments of the
National Consumer Law Center
(On behalf of its Low-Income Clients)
and
Consumers Union
Consumer Federation of America
Docket No. R-1234
Proposed Amendment to Regulation E
and
Official Staff Commentary
Regarding
Disclosure Obligations of ATM Operators

These comments¹ are submitted by the **National Consumer Law Center** (on behalf of its low income clients),² **Consumers Union**³ and **Consumer Federation of America**,⁴ regarding proposed changes to the rules for initial disclosures on ATM machines relating to fees charged to consumers who are not customers of the financial institution. This issue is relatively simple and straightforward. The Electronic Funds Transfer Act prohibits an ATM operator from charging any fee for the use of the ATM unless a notice has been placed on the machine of “the fact that a

¹Written by Margot Saunders of the National Consumer Law Center and Gail Hillebrand of Consumers Union.

² The **National Consumer Law Center**, Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer laws, including Consumer Banking and Payments Law (2nd ed. 2002), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws. Margot Saunders is co-author of the Consumer Banking and Payments Law manual.

³**Consumers Union**, publisher of Consumer Reports, is an independent, nonprofit testing and information gathering organizations, serving only the consumer. We are a comprehensive source of unbiased advice about products and services, personal finance, health, nutrition, and other consumer concerns. Since 1936, our mission has been to test products, inform the public, and protect consumers.

⁴**Consumer Federation of America**, is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers’ interests through research, advocacy and education.

fee *is* imposed by such operator for providing the service”⁵ The analysis regarding exactly what this requires then must flow from this key requirement in the governing federal law.

We believe that the Electronic Funds Transfer Act would permit signage at the ATM machine which indicated that the fee is not charged in every instance, so long as the sign adequately informs those consumers who will be charged a fee that they *will* be charged a fee. The accommodation to those ATM operators who do not charge a fee in every instance should not swallow the essence of the requirement in the federal law – that those consumers who *will* be charged a fee be adequately notified of that fact. This analysis then leads us to propose that the general intent of the Board’s proposal to allow different information to be posted at ATM machines which do not always charge fee, can be accomplished, but not in the way that the Board currently proposes. The notice that is crafted pursuant to the exception considered in this docket must be narrow and carefully crafted to ensure that the law’s original intent is carried out.

The proposal made in the current docket that the signage at the ATM machine simply say that a fee “may” be imposed accomplishes the goal of the institutions to indicate that the fee is not always imposed. However, it would not comply with the federal law’s requirement that consumers who will have a fee imposed be adequately notified of that fact. No consumer who reads the notice proposed in this docket would know whether they were going to be charged a fee or not from a notice that said a “fee *may* be imposed.” To accomplish the explicit requirement of the Electronic Funds Transfer Act, as well as the clear intent of the Act, the notice on the ATM machine must clearly indicate to those consumers who will be charged a fee that fact.

We do not disagree with the intent of the proposed change that information indicating that some consumers will not be charged a fee should also be available. We also understand that financial institutions posting these notices do not want too long or complicated a disclosure, and we believe that too much information in a sign on the ATM machine is likely to confuse consumers and defeat the basic purpose of this disclosure. These dueling goals do not prohibit a rather simple solution, however. The proposed disclosure would simply have to be redrafted.

Because the circumstances in which fees will not be charged are generally limited – and most likely to be limited to international cardholders, or in the relatively rare circumstances when the cardholder’s bank has an agreement with the ATM owner, it is important that the disclosure not create a misleading impression. A general statement – by itself using the word “may” is likely to imply a much higher likelihood of the absence of a charge than in fact will be experienced by most consumers.

We propose that the regulations governing the notice posted on the ATM machine be rewritten to clearly state these options, as follows (new language is underlined):

205.16 Disclosures on automated teller machines

...

(b) *General*. An automated teller machine operator that

⁵15 U.S.C. 1639b)(d)(3)(A)(i).

imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall disclose that fact and the amount of the fee, in a clear and conspicuous manner.

c) On the machine whenever a fee is imposed upon all customers. A notice must be placed in a prominent and conspicuous location on or at the automated teller machine that a fee will be imposed for providing electronic fund transfer services or a balance inquiry.

(d) On the machine whenever a fee may be imposed on some customers. A notice must be placed in a prominent and conspicuous location on or at the automated teller machine that a fee will be imposed for providing electronic fund transfer services or a balance inquiry except [as applicable] (to some cardholders of foreign banks), (cardholders whose issuer has made arrangements for a fee waiver), (cardholders issued pursuant to some governmental programs).

(e) Screen or paper notice. Provide the notice required by paragraph (b)(1) and (b)(2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

This consideration of a change in the Regulations and Official Staff Commentary is an accommodation to those institutions who do not charge fees in all instances and want to disclose that fact. We do not want to discourage institutions from agreeing to waive ATM fees by requiring a notice that might dictate the practice of charging those fees, and we do not want the disclosure itself to be misleading, and thereby rendered meaningless. However, the underlying requirement that those customers who will be charged a fee must be notified of that fact both at the ATM machine and on the ATM screen before the consumer is committed to the transaction, must be the leading principle in the crafting of this exception. Therefore, the primary purpose of the notice on the machine must be to adequately apprise consumers of that fact – that the fee will be charged unless the customer fits into one of a specified number of categories.

Allowing the notice on the ATM machine to state that fees *may* be imposed for use of the machine, without any explanation of the circumstances under which fees will be charged completely defeats the purpose of the federal law's requirement – it does not inform consumers of those machines at which they will be charged a fee. The proposal currently in the docket would not be in compliance with the EFTA. However, the same goals can be accomplished with the language that we have proposed.